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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 738

CHERRIN CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. _____

CHERRIN CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Cherrin Corporation, respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit (Appendix A11), entered in the above entitled action on August 13, 1965, in which case the petitioner here was also the petitioner.

A certified transcript of the record in the above case (together with 9 copies thereof), including the proceedings in the said Court of Appeals, is furnished herewith.

OPINION BELOW

The opinion and decree of the Court of Appeals, reported at 349 F.2d 1001, appears as Appendix A to this petition, p. A1. The decision and order of the National Labor Relations Board is reported at 147 NLRB 63 (it also appears in the record filed with this petition at page 24a of brief for petitioner).

JURISDICTION

The decree of the Court of Appeals (Appendix A11) was entered on August 13, 1965.

The jurisdiction of this Court to review the above-mentioned decree of the said Court of Appeals is invoked under the provisions of 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

The National Labor Relations Board under the authority of Section 9(b) of the National Labor Relations Act, as amended; the source of its power to determine appropriate bargaining units, disqualified the challenged vote of petitioner's employee, Marilyn Cherrin, on the basis of her relationship to management and the "special status" which it claims she enjoyed because of that relationship. The Court below upheld the Board's alleged right to exercise administrative discretion in this case. The question presented here is:

Whether or not the National Labor Relations Board has the *power* under Section 9(b) of the National Labor Relations Act to exercise its administrative discretion to exclude individuals from collective bargaining units on the basis of their relationship to management *plus* a finding of "special status", where that individual would not otherwise be excluded from eligibility under the provisions of Section 2(3) of the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Extracts from Article I of Constitution of the United States of America and National Labor Relations Act, As Amended U. S. C. A., Sections 151 et seq.

Article I, Section 1: All legislative *powers** herein granted shall be vested in a congress of the United States, ---

Article I, Section 8: The Congress shall have the *power**; --- to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; ---

Section 2(3) ... The term "employee" shall include any employee, --- but shall not include any individual employed --- by his parent or spouse, ---

Section 9(b) ... The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the appropriate unit for the purposes of collective bargaining shall be the employer unit, craft union, plant unit, or subdivision thereof; ---

STATEMENT OF THE CASE

This controversy arises from the sustaining of a challenge to the vote of one of Petitioner's employees in a representation election held under the National Labor Relations Act. The basic facts are as follows: Miss Marilyn Cherrin is an employee of the Cherrin Corporation, the Petitioner herein. She is the daughter of Phillip Cherrin, Secretary of the Cherrin Corporation and an owner of 20% of its stock.

---

*Emphasis is added by Counsel for Petitioner.

Pursuant to a decision of the acting Regional Director of the National Labor Relations Board, an election was held among all clerical employees of the Corporation. At the conclusion of the election, there was served upon the Office Employees' International Union, Local 10, AFL-CIO, and upon the Corporation, a tally of ballots showing that of 14 ballots cast, 7 were for the Union, 6 were against the Union, and 1 ballot was challenged by the Union on the ground that the voter, Marilyn Cherrin, was the daughter of the owner of the Corporation. As this ballot was determinative of the results of the election, it was received and segregated to maintain its secrecy. Thereafter, the Union filed with the acting Regional Director timely objections to the conduct of the election. As to the ballot of Marilyn Cherrin, the acting Regional Director by the exercise of his alleged administrative discretion to do so, pursuant to Section 9(b) of the National Labor Relations Act, sustained the challenge to her ballot on the basis of the fact of her relationship to management and his finding of the existence of "special status". This resulted in the Union's having a majority of votes; and it was certified as a bargaining representative of the employees' of the clerical unit.

Thereafter, the Cherrin Corporation refused to bargain with the union; a complaint was issued; all parties stipulated that the case should be transferred to the Board, without a hearing before a Trial Examiner; and a stipulation was entered to provide that the sole question to be decided was whether the acting Regional Director erred in sustaining the challenge of the ballot of Marilyn Cherrin. The Board found that the acting Regional Director properly sustained the challenge of the ballot of Miss Cherrin: that Petitioner Corporation has unlawfully refused to bargain with the union; and directed petitioner to cease and desist from refusing to bargain and to post

appropriate notices. The Cherrin Corporation petitioned the United States Sixth Circuit Court of Appeals for review of the findings of the National Labor Relations Board, jurisdiction having then been invoked under the provisions of 29 U.S.C.A. 160(s). The Board cross petitioned for enforcement of its order. The Court of Appeals upheld the National Labor Relations Board's finding of "special status" and further held that it would not be an arbitrary and capricious decision of the Board to exclude an employee from the unit and voting, upon various reasonable grounds, including family relationship to the owners. Based upon these findings the Court decreed enforcement of the Board's order. This petition seeks to obtain a review of the findings of the Court below.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Section 9(b) of the National Labor Relation Act so as to deprive employees of the fullest freedom in exercising the rights guaranteed to them by the Act and permits an encroachment by the judiciary on an area committed by the Constitution to legislative pronouncement, Article I, Sections 1 and 8 U.S. Constitution. The question presented in this petition is novel to this Court. It has not made its appearance in any of the Circuit Courts other than the U.S. Sixth Circuit Court of Appeals, where it appeared first in *N.L.R.B.* v. *Sexton*, 203 F.2d 940 and subsequently in this case below.

In decreeing enforcement of the Board's order the Court below said, "---The Board would not have the *right** to exclude an employee from the unit, or from voting, solely because of relationship to the owner,---". The Court must

*Emphasis is added by Counsel for Petitioner.

have been referring to a *lack of that right* under the authority of Section 9(b) of the National Labor Relations Act, since clearly relationship to the owner would be a basis for the exclusion of certain relatives under Section 2(3) of the Act.[1] In addition, this same Court in its earlier decision of the *Sexton* case said that there was "no justification for the *exercise of discretion*[2] on the part of the Board, by virtue of Section 9 of the Act", to exclude relatives other than those specifically excluded by Section 2(3). The above quoted excerpts are profound, clear and logical statements pointing to the unjustified exercise of administrative discretion to determine the composition of collective bargaining units on the basis of certain extra-statutory criteria. Despite the *Sexton* ruling and the above quoted statements of the Court below in this case, the Court in its opinion below went on to say, "---it would not be an arbitrary and capricious decision of the Board to exclude an employee from the unit and voting, upon various reasonable grounds, including family relationship to the owners." On the basis of sheer logic, your Petitioner contends that if there was no justification for the exercise of administrative discretion in the instance of *Sexton*, the Court was equally powerless to grant it here. To allow the Circuit Court of Appeals to grant the *right* to exclude an individual from a bargaining unit on the basis of a new and novel

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1. That the relationship here of petitioner's employee to petitioner was not one of those to be excluded from the definition of employee for the purposes of the National Labore Relations Act is pointed out by the Court below when it stated "Miss Cherrin is not a child of the owner, since the owner is a corporation and her vote could not thereby be excluded as a child of the owner under Title 29 USCA 152(3)" (See Appendix page A5). The Board has also recognized the propriety of not excluding children of corporate officers and stockholders. See Printing Industry of Delaware, 131 NLRB 1100.

2. Emphasis is added by Counsel for Petitioner.

criteria i.e. family relationship plus "special status", a criteria which the N.L.R.B. has tortured into existence; especially when that same Court in the earlier *Sexton* case made clear the limits of its own authority by refusing to allow family relationship to management to be a criteria for the exercise of administrative discretion under Section 9(b) of the National Labor Relations Act, is to convert a Court of Law into a legislative body and pervert the meaning and spirit of our Constitution, Article I, Sections 1 & 8. Surely, to engraft the criteria of family relationship into Section 9(b) of the statute, is just as wrong as engrafting family relationship plus "special status". If the statutory *power* did not exist to exclude an individual on the basis of family relationship alone *N.L.R.B.* v. *Sexton, supra,* then it is illogical to assume that it can be brought into existence by the addition of "various reasonable grounds" as the Court below phrases it or as "special status" as the Board phrased it. If the Court below once recognized that Congress had the control or the criteria justifying the exercise of administrative discretion *N.L.R.B.* v. *Sexton, supra,* what has changed to now allow the Court to exercise this control. Petitioner can find no authority for such a change.

Aside from the wrongful exercise of discretion, in order to achieve the result arrived at below, the N.L.R.B. developed a so called, "special status" doctrine which it appears from a review of the cases has been used by the National Labor Relations Board exclusively for the purpose of excluding individuals from bargainng units who are related to management. Indeed, the clear implication of the decisions of the Board, involving employees other than relatives, is that the close affinity which might exist between such employees and the employer is not ground for their exclusion. For example, in *Waterman Dock Co.*, 89 N.L.R.B.

452, the employer sought exclusion of certain employees because he had voluntarily granted them special benefits and privileges. The Board rejected the employer's position, stating: "the mere fact that certain benefits have been extended to certain employees, and denied others, is not sufficient basis for denying the favored group the right to benefits of collective bargaining through a labor organization." In *American Can Co.* 56 N.L.R.B. 657 and *Edgewater Steel Co.*, 56 N.L.R.B. 1778, the Board held that the fact certain employees were salaried would not warrant their exclusion from a unit in which other employees were hourly-rated. Similarly, the fact that certain employees had higher wage rates than comparable employees did not preclude their inclusion in the unit. *Underwood Corp.*, 107 N.L.R.B. 1132. It appears, therefore, that the Board's policy of exclusion on the basis of "special status" allying the employee's interests with those of management, has been applied only in the case of relatives, which fact lends emphasis to what is apparent from the Court below's own pronouncement, namely, that the exclusion is based solely upon family relationship, and is therefore beyond the Board's powers.

A further perversion of justice can be found in the language of the Court below where the Court expresses its misgivings about the result of this case when it states,

> "---Miss Cherrin appears from the records to be an industrious, reliable employee, with no favors asked and no favors given; and under the ruling case of *N.L.R.B.* v. *Volney Felt Mills*, 210 F.2d 559, the reasons given for excluding her from the clerical unit, and depriving her of her vote, appear to hark back to the period before *N.L.R.B.* v. *Sexton*, *supra*, and are thin, indeed.
>
> If this case were before us de novo, we would, possibly, consider of small importance the evidence with

> regard to punching the time clock, the fact that no record was kept of absences on account of illness, the lack of reprimand for tardiness, and showing that Miss Cherrin enjoyed special status that allied her in interest with those of management. But the Board is nearer these controversies than the Courts. It is more experienced in these cases that have many windings. Moreover, review of the Board's findings by the Court is strictly limited by Congress."

Petitioner contends that the Court below was mistaken in using *Volney* as authority for its decision in this case. The first paragraph of the opinion of the Court below in *Volney* recites the grounds upon which the respondent there attacked the validity of the Board's order, and there is no mention of violation of Section 2(3) of the Act as being one of the grounds of attack. Nor does the Court in *Volney* assess the impact of its ruling on its prior decision in *Sexton*. Indeed, the latter case is not even mentioned in the Court's opinion in *Volney*. It is apparent therefore, that the Court did not intend, in its decision in *Volney*, to modify its ruling in *Sexton*, the Court in *Volney* was not concerned with the effect of Section 2(3) on the Board's powers under Section 9(b) of the Act, the Court there applied the test generally applicable to review of decisions of the Board in unit determinations, and held that the rulings of the regional director were not "arbitrary or capricious". The question in this case is not alone whether the action of the Board in excluding employees "upon various reasonable grounds, including family relationship" was "arbitrary and capricious", but also whether such action was in contravention of Section 2(3) of the Act. Therefore, since this question was not considered or decided in *Volney*, we submit, *Volney* is not authority for the Court's decision below.

The Petitioner, a tiny cog in the wheel of our national economy, will naturally feel the effect of the result of this

controversy most immediately and directly. More important, however, is the fact that the principle involved in this case is huge. Clearly, a mis-use of power here, if unchecked by this court, will create a judicial basis for more disastrous abuses of statutory authority. The already overly powerful N.L.R.B. will more brazenly create new extra-statutory criteria upon which to exercise its discretion and so will her sister agencies. It should be obvious that the principle to be devolved from this controversy is of great and far reaching significance. To judicially grant to an administrative agency the power already usurped by the N.L.R.B. here, will raise havoc with our whole system of jurisprudence.

CONCLUSION

For the foregoing reasons Petitioner urges that the Petition for the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

No. 16045

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CHERRIN CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON PETITION for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Decided August 13, 1965

Before: MILLER and CECIL, Circuit Judges, and McALLISTER, Senior Circuit Judge.

McALLISTER, Senior Circuit Judge. Miss Marilyn Cherrin is an employee of the Cherrin Corporation. She is the daughter of Phillip Cherrin, Secretary of the Cherrin Corporation and an owner of twenty per cent of its stock. Miss Cherrin is also a niece of all of the other officers and owners of the Cherrin Corporation.

Pursuant to a decision of the Acting Regional Director of the National Labor Relations Board, an election was held among all the clerical employees of the Corporation. At the conclusion of the election, there was served upon the Office Employees' International Union, Local 10, AFL-CIO,

and upon the Corporation, a tally of ballots showing that of 14 ballots cast, 7 were for the Union, 6 were against the Union, and 1 ballot was challenged by the Union on the ground that the voter, Marilyn Cherrin, was the daughter of the owner of the Corporation. As this ballot was determinative of the results of the election, it was received and segregated to maintain its secrecy. Thereafter, the Union filed with the Acting Regional Director timely objections to the conduct of the election. As to the ballot of Marilyn Cherrin, the Acting Regional Director sustained the challenge. This resulted in the Union's having a majority of the votes; and it was certified as the bargaining representative of the employees of the clerical unit.

Thereafter, the Cherrin Corporation refused to bargain with the Union; a complaint was issued; all parties stipulated that the case should be transferred to the Board, without a hearing before a Trial Examiner; and a stipulation was entered to provide that the sole question to be decided was whether the Acting Regional Director erred in sustaining the challenge of the ballot of Marilyn Cherrin. The Board found that the Acting Regional Director properly sustained the challenge of the ballot of Miss Cherrin; that petitioner Corporation had unlawfully refused to bargain with the Union; and directed petitioner to cease and desist from refusing to bargain and to post appropriate notices. From the Board's order, petitioner seeks review.

The only issue presented by the parties is whether the Board's action in excluding Miss Cherrin from the bargaining unit of the clerical employees and sustaining the challenge of her ballot, was reasonable, proper, and authorized by the National Labor Relations Act.

It is contended by the Board that where an employee is the daughter of the Secretary, a twenty-per-cent shareholder in a small family-owned corporation, where her

father actively participates in the business, where the other owners are also related to her, and where she is accorded special status, different from that accorded other employees in the bargaining unit, the Board is not prohibited from taking her family relationship into account in deciding whether the purposes of the Act will best be served by including her in a unit with other employees.

The Board's determination that Marilyn Cherrin enjoyed special status on account of her relationship to the management is based upon four findings that, unlike other employees: 1) she did not punch a time clock; 2) she was paid a weekly salary; 3) no record was kept of her absences on account of illness; and 4) she was not reprimanded or penalized for tardiness.

Petitioning Corporation contends that there is no authority under the Act, either by virtue of Section 2(3) or Section 9(b) thereof, authorizing the Director to exclude Miss Cherrin, admittedly an employee of the petitioner, from the bargaining unit, and thereby depriving her of her vote. In support of its contention, the petitioner relies upon the decision of this court in *N.L.R.B.* v. *Sexton,* 203 F.2d 940. In that case, the court held that where the Board excluded the employer's nephew, because of family relationship, from the appropriate bargaining unit and from participating in an election to select the bargaining agent, the order of the Board directing the employer to bargain collectively with the certified bargaining agent, would not be enforced in view of the fact that the Board did not have authority to exclude, for such reasons, any person other than a spouse or a child of the employer, under the National Labor Relations Act, Section 2(3), 8(a), (1, 5), 9, as amended, 29 U.S.C.A. Sections 152(3), 158(a), (1, 5), 159.

To the foregoing contention, the Board replies that the *Sexton* case is not here applicable since the Board in

the instant case did not exclude Miss Cherrin from the election because of her relationship to the owners of the Corporation, but because of the special status accorded to her on account of such relationship. In this regard, the Board claims that the decision of this court in *N.L.R.B.* v. *Volney Felt Mills,* 210 F.2d 559, sustains its contention that the Board is not forbidden to consider family ties in making unit determinations. In the *Volney* case, the Board had sustained challenges to ballots cast by a son, a son-in-law, and a brother, of three supervisory workers, on the ground that these three employees had a diversity of interest from other production and maintenance employees, because of such privileges and special consideration in work assignments enjoyed by them, growing out of and due to their being relatives of the supervisory employees. In decreeing enforcement of the Board's order based on the election in the *Volney* case, this court said:

> "The rulings of the Regional Director were not arbitrary or capricious since they were based upon reasonable grounds, including family relationship of challenged voters to supervisory employees, one of such supervisory employees being the general superintendent of the respondent, and it is to be noted that unless there was infirmity in each of the challenges the union would still have prevailed and a mistake of honest judgment does not constitute an arbitrary or capricious decision."

It is our conclusion that, while the Board would not have the right to exclude an employee from the unit, or from voting, solely because of relationship to the owner, it would not be an arbitrary and capricious decision of the Board to exclude an employee from the unit and voting, upon various reasonable grounds, including family relationship to the owners.

However, the findings of the Board that Miss Cherrin was accorded special status on account of her relationship

to the owners of the Corporation rest on rather flimsy evidence; and we are left with the impression that the case against petitioner is pretty thin.

Miss Cherrin is not a child of the owner, since the owner is a corporation; and her vote could not thereby be excluded as a child of the owner under Title 29 U.S.C.A. Section 152(3). Of course, her father is Secretary of the Corporation and a twenty-per-cent owner of the stock. But Miss Cherrin is not an individual in the employment of her father, but an individual in the employment of a corporation in which her father is a minority stockholder and an officer.

Formerly, in these cases, mere existence of a close family relationship of an employee to the management was considered and held by the Board to be ground for exclusion of such employee from a bargaining unit. Under such a rule, Miss Cherrin would be excluded on the ground of family relationship, not only because her father was a stockholder and officer of the Corporation, but because of her relationship to all of the other officers and stockholders. It was, however, the decision of this court in *N.L.R.B.* v. *Sexton*, 203 F.2d 940, that resulted in the abandonment of such a rule, and the new rule adopted by the Board is that in order to exclude an employee from a bargaining unit, such family relationship can be considered *only if the employee enjoys a special status which allies his interests with those of management.* See *International Metal Products Company*, 107 N.L.R.B. 65. It is, therefore, now recognized that family relationship of an employee to persons constituting the corporation is not sufficient for exclusion of such employee from the bargaining unit. There has to be more. It must be established that such relationship of an employee to management can be considered only if the employee enjoys a special status as a result thereof.

It might be supposed that Miss Cherrin would vote in the election as the officers of the Corporation wanted the employees to vote, that is, against the Union. But, in *N.L.R.B.* v. *Sexton, supra,* it also might have been supposed that the nephew employed by the owner would vote in the election as his uncle wanted the employees to vote. However, as previously stated, mere family relationship to the owner does not exclude an employee from such an election except "an individual employed be his child or spouse." And, in the *Volney Felt Mills* case, it was, as heretofore mentioned, the family relationship to supervisory employees that justified the exclusion of the challenged voters where, because of such family relationship, the excluded voters had enjoyed special privileges and special consideration or work assignments.

In support of the Board's findings, it is contended by appellee that Miss Cherrin actually enjoyed a special status which allied her interests with those of management. In proof of this contention, it is claimed by the Board that Miss Cherrin was not obliged to punch a time clock, as was required by other employees. Miss Cherrin, in her affidavit, which is accepted as evidence, stated: "When I began my employment I was required to punch the time clock—After two months or so I discontinued using the time clock. I do not recall whether I was instructed to discontinue using the time clock or whether I took it upon myself not to use it after that time." It does not appear in the record that the employer ever gave Miss Cherrin permission, or instructed her, not to use the time clock. It is to be said that nowhere in the record does it appear that she kept hours different from the other office clerical employees. The office manager of the petitioning Corporation stated that her regular hours of employment were from 8 A. M. to 4:30 P. M. In Miss Cherrin's affidavit she states: "I began my employment as a full time em-

ployee for Cherrin (Corporation) working 40 hours per week Mondays thru Fridays. I worked 8 hours per day. I continue to work 8 hours per day and 40 hours per week on Mondays thru Fridays." The office manager, in his affidavit, further stated: "The [time] clock is not used when the girls take their coffee breaks and their lunch periods." The record reveals that Miss Cherrin was *required* to punch the time clock. The Corporation contends that "At most the record shows that Marilyn Cherrin did not punch the time clock as she was told to do and was not punished by her employer for failure to follow the the rule"; and, also, that the evidence shows that the Corporation's rules relative to the punching of the time clock are very liberal and limited in their enforcement against all office clerical employees. With these contentions of the Corporation, we agree. However, the fact that Miss Cherrin did not punch the time clock, as other employees were required to do, and that she was not penalized for her failure to do so, is some evidence of special consideration, and the Board's finding on this aspect of the case cannot be said to be arbitrary and capricious.

With regard to the fact finding that, unlike other employees, Miss Cherrin was paid a weekly salary, it appears that the office manager referred to her remuneration as "a salary of $60.00 per week for 40 hours work" but he also referred to the remuneration of other clerical employees working the same number of hours at the same rate of pay, as a "salary". We are of the opinion that there is no basis in the evidence for the Board's finding that Miss Cherrin enjoyed a special status *as a salaried employee,* while other clerical employees doing the same work were not salaried employees.

The third finding of the Board was that Miss Cherrin enjoyed a special status because no record was kept of her

illness, but that other employees' sick leave is recorded, "and that the employer's sick leave policy—limiting absences to five per year—is thus not applied to Marilyn." The record disclosed that Miss Cherrin had missed only two days' work because of illness during the prior year and a half. The foregoing constitutes a rather flimsy basis for the Board's finding that Miss Cherrin enjoyed a special status because no record was kept of her absences on account of illness, since, for a period of more than a year, she did not take half of the sick leave to which she was entitled. However, the fact that, in her case, records were not kept of her absences because of illness, but that other employees' sick leave was recorded, gives some basis for a finding of special consideration, although the actuality was that she did not receive any such special consideration because of the failure of the office manager to record her absences on account of illness.

Finally, the Board's finding that "unlike other employees who are subject to reprimand and/or penalty if they report for work late, Marilyn Cherrin * * * has never been reprimanded or penalized when she has been tardy." In this regard, the affidavit of the office manager stated: "I have never had to reprimand an employee for excessive absenteeism or tardiness * * * [W]ith respect to not allowing employees a grace period if they are late to work, we do not strictly enforce our reporting time. The question of whether an employee will be penalized is entirely up to me. In many instances when an employee is late we waive such a penalty as deducting the amount from their pay. Marilyn Cherrin has not to my knowledge ever been penalized for being late to work. On occasion, the number of times I cannot recall, Marilyn has arrived later than 8:15 or 8:20 a.m. but has not been penalized. On occasion she has worked beyond her required time in order to offset any tardiness. The other office employees are al-

lowed to follow this procedure." In this regard the Board contends: "Since the affidavit [of the office manager] states that in *many* instances, the employer waives deducting the lost time from the employee's pay, the Board reasonably inferred that in *some* instances such a deduction was made. No record is kept of Marilyn's hours, consequently no such deduction could have been made in her case. Thus, the Board's inference that she is treated differently is reasonable."

When the Union challenged Miss Cherrin's ballot, it was challenged on the ground that she was a daughter of the owner. This would have been sufficient to exclude the ballot under the rule followed by the Board before the decision of this court in *N.L.R.B.* v. *Sexton,* 203 F.2d 940, but it is not sufficient ground for exclusion since that decision. It was not until the investigation conducted by the Acting Regional Director, after the election for a bargaining agent, that the reasons for sustaining the challenge were based, not upon the fact that Miss Cherrin was a daughter of the owner, but, also, probably as an afterthought, on the ground that, as a result of such relationship, she occupied a special status.

The evidence as it appears to us discloses that Miss Cherrin worked eight hours a day, forty hours a week, at the same remuneration that other similar clerical employees received; that when she was late for work, she put in extra time at the end of the day to make up for the time she had lost; that she was not a "salaried" employee, different from other employees doing the same kind of work, at the same rate of pay; that she actually received no special consideration because of absence for illness; and that she was treated in no different way than other clerical employees with regard to reprimand or penalty for tardiness. Miss Cherrin appears from the record to be an industrious,

reliable employee, with no favors asked, and no favors given; and under the ruling case of *N.L.R.B.* v. *Volney Felt Mills*, 210 F.2d 559, the reasons given for excluding her from the clerical unit, and depriving her of her vote, appear to hark back to the period before *N.L.R.B.* v. *Sexton, supra*, and are thin, indeed.

If this case were before us de novo, we would, possibly, consider of small importance the evidence with regard to punching the time clock, the fact that no record was kept of absences on account of illness, and the lack of reprimand for tardiness, as showing that Miss Cherrin enjoyed special status that allied her interests with those of management. But the Board is nearer to these controversies than the courts. It is more experienced in these cases that have many windings. Moreover, review of the Board's findings by the courts is strictly limited by Congress.

In any event, the facts and all inferences to be drawn therefrom are for the fact finder, in this case, the Board, and, with one exception above mentioned, we cannot say that the Board's findings are arbitrary and capricious, which is the standard to be followed in representation proceedings.

In accordance with the foregoing, the Board's petition for enforcement of its order is hereby decreed.

APPENDIX B

No. 16,045

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CHERRIN CORPORATION, A MICHIGAN CORPORATION FORMERLY CHERRIN BROS. COMPANY AND CHERRIN PRODUCTS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Order

BEFORE: MILLER, CIRCUIT JUDGE, MCALLISTER AND CECIL, SENIOR CIRCUIT JUDGES.

On petition for review and cross-petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the Board's order be and it is hereby granted.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss

Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 738

CHERRIN CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A10), is reported at 349 F. 2d 1001. The Board's Decision and Order (P.A. 29a–30a) [1] are reported at 147 NLRB 527.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1965 (Pet. App. A11). The petition for a writ of certiorari was filed on November 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to the Appendix to petitioner's brief filed in the court below.

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STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, * * * but shall not include any individual employed * * * by his parent or spouse * * *.

* * * * *

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly exclude an employee from a bargaining unit upon finding that she was accorded a special status because of her family relationship to the corporate employer's officers and shareholders.

STATEMENT

On December 17, 1963, the Regional Director of the National Labor Relations Board conducted an election among petitioner's office clerical employees, in which seven employees voted for the Union,[2] six

[2] Office Employees International Union, Local 10.

voted against, and the ballot of employee Marilyn Cherrin was challenged by the Union. The Regional Director sustained the Union's challenge and certified it as the bargaining representative after an investigation which disclosed that (1) Marilyn Cherrin was the daughter of Phillip Cherrin, the Company's secretary and the owner of 20 percent of its stock, and the niece of all the other shareholders and Company officers; (2) she lived in her father's house; and (3) she was the only office clerical employee not required to punch a timeclock, not paid on an hourly basis, not subject to reprimand or penalty for tardiness, and whose absences on account of illness were not recorded (P.A. 1a, 5a–6a). The Regional Director concluded that Marilyn Cherrin enjoyed special status on account of her relationship to her employer, and that thus she "does not share a sufficient community of interest with the other office clerical employees to warrant including her in a bargaining unit with them" (P.A. 7a–8a). The Board denied petitioner's timely request for review, and, after petitioner refused to bargain, found that it had violated the Act. After the Board issued an order requiring petitioner to cease and desist and to bargain on request with the Union, petitioner filed a petition for review in the court below, and the Board filed a cross-petition for enforcement.

The court of appeals sustained the Board's finding that the challenged employee was accorded special status on account of her family relationship to top

management.[1] Holding that the Board has discretion to exclude from the bargaining unit a close relative of management accorded special status, the court found that the certification of the Union was valid and enforced the order based thereon (Pet. App. A1–A10).

ARGUMENT

It is well settled that Section 9(b) of the Act gives the Board wide discretion to determine "in each case * * * what unit is appropriate for the purposes of collective bargaining." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146; *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 388 (C.A. 6); *National Labor Relations Board* v. *Weyerhaeuser Co.*, 276 F. 2d 865, 869 (C.A. 7); *National Labor Relations Board* v. *Esquire, Inc.*, 222 F. 2d 253, 255–257 (C.A. 7). The sole question presented is whether the Board abused that discretion in excluding Marilyn Cherrin from the unit involved here. The court below correctly concluded that the Board acted reasonably, and there is no conflict of decisions. Consequently there is no occasion for further review.

Special status based upon family relationships may create conflicts of interest between the employees who are accorded such status and those who are not. Ac-

[1] The court rejected the Board's finding that Miss Cherrin enjoyed a special status as a salaried employee while the other employees were hourly-rated (Pet. App. A7) but sustained all the other findings of special status.

cordingly, from the beginning of its administration of the Act, the Board automatically excluded management's lineal and collateral relatives from otherwise appropriate bargaining units. *E.g., Louis Weinberg Associates, Inc.*, 13 NLRB 66; *O. U. Hofmann*, 55 NLRB 683, affirmed, 147 F. 2d 679 (C.A. 3); *P. A. Mueller & Sons, Inc.*, 105 NLRB 552; *Jerry & Edythe Belanger*, 32 NLRB 1276. In *National Labor Relations Board* v. *Sexton Welding Co.*, 203 F. 2d 940 (*per curiam*), however, the Sixth Circuit disapproved the Board's automatic exclusion policy. Thereafter, the Board modified its policy and has excluded relatives of top management only upon a showing that they were in fact accorded special status on account of family ties. *International Metal Products Co.*, 107 NLRB 64, 66–67; *Niagara Beer Distributors Association*, 108 NLRB 1571, 1574; *American Steel Buck Corp.*, 107 NLRB 554, 556; *Giordano Lumber Co., Inc.*, 133 NLRB 205, 207, n. 7; *MacIntyre Motor Co.*, 119 NLRB 54, 56. In this case, it is clear that Marilyn Cherrin had close family ties with the stockholders and officers of the Company and, as the court below correctly held, there was sufficient evidence to support the Board's finding that she was accorded a status different from that of the other employees because of her relationship to management.

The Board's revised policy is plainly reasonable, as the Sixth Circuit properly held in approving its application here, and petitioner has made no showing to the contrary. See also *National Labor Relations*

Board v. *Volney Felt Mills, Inc.*, 210 F. 2d 559 (C.A. 6) (*per curiam*). Although no other court of appeals has had occasion to consider the validity of the particular rule applied here, special status based on factors other than family relationship has been held to be a proper ground for exclusion. See *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 694 (C.A. 4) (confidential secretary).

Petitioner's argument (Pet. 6) that Section 2(3) deprives the Board of its usual discretion to determine the proper unit placement of employees when the employee in question is related to corporate management is without merit. That section provides only that an employer's children and spouse are not "employees" within the meaning of the Act;[4] it does not direct the Board to include any employee in any particular unit. The legislative history of Section 2(3) discloses no congressional intention to limit the Board's power to determine appropriate bargaining units under Section 9(b).[5]

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[4] Since petitioner is a corporation, Marilyn Cherrin is not the child of her employer within the meaning of Section 2(3).

[5] S. Rep. No. 573, 74th Cong., 1st Sess., 7, reprinted in 2 Legislative History of the National Labor Relations Act, 1935, p. 2306, states only that Congress decided to exclude the named categories of workers "[f]or administrative reasons" but decided not to "exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work."

Significantly, while Congress has several times amended Sections 2(3) and 9 since the Board began excluding top management's relatives from bargaining units, it has never outlawed the practice. "[I]t is a fair assumption that * * * Con-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

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gress accepted the construction placed thereon by the Board * * *." *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365–366.